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416-923—71

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 515

UNITED STATES OF AMERICA, PETITIONER

v.

SOUTHERN UTE TRIBE OR BAND OF INDIANS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

PETITIONER'S REPLY BRIEF

I. THE RES JUDICATA ISSUES

The government's contentions regarding the application of *res judicata* are, first, that the lands in question fall within the description of land "formerly owned or claimed by [the Confederated Bands of Utes] in western Colorado, ceded to the defendant by the Act of June 15, 1880," as to which respondent, by its present attorney, settled all claims in return for a 40 percent share of the 1950 settlement judgment; and, second, that since they do fall within that description, it was improper to entertain parole evidence to show a different meaning. Respondent appears not to

dispute the latter contention, and argues solely that the lands in question here were not ceded by the 1880 Act.

At the outset, it may be doubted whether this is an appropriate case for applying rules of construction so rigorously in favor of Indian interests as respondent asserts. Certainly it is not the government's view that it is "avoid[ing] any payment whatsoever" for the Southern Ute lands (Resp. Br. 20). Those lands were part of the reservation ceded as a whole by the Confederated Bands in 1880; they were the only part of the Ute Reservation inhabited by the Southern Utes, who received a 40 percent share of the settlement judgment made in 1950.[1] Moreover, the issue of construction in this case arises in the context, not of a treaty entered with an Indian tribe to which the United States has duties as trustee and guardian, but of a settlement agreement negotiated with attorneys of the

[1] As respondent is aware, the Confederated Bands of Ute Indians received moneys relating specifically to lands in the area here claimed by the Southern Ute Tribe or Band ("Royce Area 617") in the 1950 settlement as well as in the 1910 litigation, *The Ute Indians* v. *United States*, 45 Ct. Cl. 440. The judgment on the accounting claims in 1910, No. 30360, included $172,553.55 in proceeds of sales from this area and $61,992.50 in payment for lands taken for the San Juan National Forest; the settlement reached in 1950, No. 46640, included $43,436.40 in additional receipts specifically tied to sales of lands in this area, for a total of $215,989.95. Over the same period of time there was an additional, duplicate accounting and payment to the Southern Ute Tribe or Band under Section 5 of the Act of 1895, in the total amount of $215,977.58. Resp.'s Memo. in Support of Motion to Vacate Order of Remand in the Court of Claims, p. 5 n. 2; see, also, Govt. Br. (Ct. Cl.) 33; Govt. Reply Br. (Ct. Cl.) 10–11. These matters were sloughed off below as having been outside the jurisdiction of the deciding courts (App. 42, 86).

highest professional standards of industry, skill, tenacity and fidelity. *Confederated Bands of Ute Indians* v. *United States*, 120 Ct. Cl. 609, *passim*. In fixing the meaning of that settlement agreement, it is inappropriate to hold the United States to any greater standard of precision or care than the attorneys for the other side.

Respondent does not deny that the lands which are the basis of this suit were part of the Ute Reservation ceded to the United States by the Confederated Bands in 1880. Rather, it contends either that the southern strip of the reservation was reserved by the Act as tribal lands, or that the Act was merely executory and effected no cession whatever pending subsequent enactments in 1882 and 1895. Neither contention bears examination.

1. As we show in detail in our main brief, the 1880 Act reserved no tribal lands; rather, it provided for a procedure by which allotments in severalty could be made to individual Indians in specified, limited areas of the prior reservation, and the remainder would then be opened for public sale. The area reserved for the Southern Utes was "the unoccupied agricultural lands on the La Plata River," in Colorado, and, if that did not suffice, also on the same river in New Mexico. 21 Stat. 200. As inspection of any atlas will show, the La Plata is a small stream, which runs southward through the 15-mile width of the 100-mile-long strip respondent claims this language reserved. It is hard to imagine that by referring to agricultural lands in the valley of this single stream,

to be conferred on individual Indians in severalty, Congress and the tribe reserved to tribal ownership lands extending more than 60 miles east of the stream, across the valleys of larger rivers, the Animas, the Los Pinos, and the San Juan. Respondent's whole case depends on the assertion that the reference to the La Plata had that effect.

That it did not is shown by the sources on which respondent itself relies. Although the ratification agreement signed by the Southern Utes in 1880 has no independent effect,[2] it states that the Southern Utes did "cede, sell and convey" their reservation lands except for those on and near the La Plata. Resp. Br. 22. The lands the Southern Utes occupied were coextensive with the 15-by-100-mile strip respondent claims this language reserved; if those lands did constitute, as respondent claims, a separate reservation maintained as such by the Act, then the Southern Utes would have sold nothing at all. Of course, the Act embodied no such legerdemain; it involved the sale and cession of the Ute Reservation as a whole, with reservation of land only to the extent that might be required for allotment to individual Indians in severalty.

As Commissioner Manypenny recognized in the report on which respondent relies, Resp. Br. 23 and n. 33, creation of a reservation on the former Southern Ute lands would have required the government "*to so modify* the [1880] agreement" as to restore

[2] The treaty reflected in the 1880 Act was with the whole of the Confederated Bands and required ratification by three quarters of all the male members of the Bands.

the lands to tribal ownership. (Emphasis added.) That was done, as to the lands now constituting the Ute Mountain Reservation, by the Act of 1895. But until that time, as we show in our main brief, there were no rights of tribal ownership in any of this land.

2. If by its argument that the 1880 Act was merely "executory" respondent means to suggest that it effected no cession, then respondent has taken itself outside the parameters of this case. The issue here is what the 1950 settlement agreement meant when it referred to lands ceded by the 1880 Act; it would be strange for one of the signatories to that agreement to assert that no lands were ceded, as respondent's present emphasis on the Act of 1882 would suggest.

The language of the settlement agreement must be given content, and so we must assume for its purposes that reservation lands *were* ceded to the United States by the 1880 Act, subject perhaps to the necessity of future legislation to make them available to the public at large. The 1882 Act was such a provision, opening to public settlement that part of the former reservation against which no claim for allotment could any longer be made.

As Congress recognized, the government's actions after 1880 left the Southern Utes "in the anomalous condition of having ceded their reservation and yet remaining upon it." H. Rep. No. 799, 53d Cong., 2d Sess., 2; S. Rep. No. 279, 53d Cong. 2d Sess., 2. The Act of 1895 was passed to remedy that situation. Out of the lands which had been ceded to the government in 1880, the Act created a new reservation, provided

for the possibility of allotment of other lands to interested and able Indians over a brief period of time, and otherwise opened the land to public claim.

The Act contains no language of cession, which its legislative history recognized as having been accomplished in 1880. Section 2 provides for allotments; Section 3 sets aside a reservation for those who would not take allotments; and Section 4 opens the unallotted lands to occupancy and settlement—in precisely the same manner as had the 1882 Act. All of this was to be done, it is implicit, with what were already public lands by virtue of the 1880 Act, albeit lands impressed by that Act with fiduciary duties vis-à-vis the Indians.[3] Respondent relies (Br. 30) on the language

[3] We note again our view that these duties ran to a group larger than the two bands of Utes which have brought this suit. The Weeminuche, or Ute Mountain, Utes were part of the Southern Ute Tribe as it was constituted at the time of the 1895 Act, and hence shared a beneficial interest in the proceeds due to the Southern Utes under the 1895 Act—an interest held foreclosed to them below by their failure to associate themselves with this suit before the passage of the time set by statute for the filing of claims. See Pet. Br. 37 n. 13. In addition it could be argued that the White River and Uncompahgre Utes had interests in the proceeds of the land under the terms of the 1880 Act, just as respondent appears to have shared in the proceeds of the northern part of the reservation.

Whether it was in Congress' power to abrogate these interests, as in effect was done by the 1895 Act, need never be decided, since any such argument has been compromised by the settlement of 1950. But in assessing the failure of these other Ute bands to make such a claim, on which respondent apparently relies, Resp. Br. 8–9, 30–31, 42, it should be noted that they specifically compromised those claims in a resolution, subsequently accepted by Congress, specifically stating how the 1950 judgment should be divided. 65 Stat. 194 (25 U.S.C. 672). Since the

of Section 3 as recognizing complete and absolute tribal ownership of the land. So it does. But the fallacy of the argument is that it assumes that this was in some measure a recognition of continuing tribal rights under the 1880 Act. The rights of tribal ownership recognized were created by the 1895 Act; had it been otherwise, there would have been no necessity for the 1895 Act to "set apart and reserve" to the Indians that land.

3. Respondent's extensive references to the manner in which the Ute lands were administered after 1895 can be relevant only in assessing what counsel might reasonably have understood by the reference in the settlement agreement to lands "formerly owned or claimed by [the Confederated Bands of Utes] in western Colorado, ceded to the defendant by the Act of June 15, 1880." We could not deny that statements can be found in various places, like the *dictum* in *Hiram M. Hamilton,* 32 L.D. 119, Resp. Br. 47, and the Restoration of 1938, App. 85, reflecting a mistaken understanding of the 1880 Act as having reserved tribal

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other bands' potential claims are now barred, respondent's present assertion that the interests in these lands are not joint is gratuitous. When respondent appeared with the other members of the Confederated Bands in this Court in 1947, it was equally emphatic that in the 1880 Act,

> The chiefs and headmen agreed to attempt to persuade their people "to cede * * * all of * * * the present Ute Reservation." R. 26. The only thing reserved to petitioners [the Confederated Bands, including the Southern Utes] was the right to individual allotments. * * *

Confederated Bands of Ute Indians v. *United States*, 330 U.S. 169, No. 141, O.T., 1946, Pet. Br. 16 n. 4; see also *id.* at 24 n. 6, and our main brief at pp. 11–12, 25–26.

rights in land to the Southern Utes. But in considering the understanding of counsel, we find their own contemporary statements more persuasive. Counsel understood in 1947 that the "central purpose of the act" was "to acquire *all* of the land of the then 'present Ute Reservation,' " No. 141, O.T. 1946, Pet. Br. 23 (emphasis added), and that the sale "exceptions were 'unoccupied agricultural lands on the La Plata River,' 'agricultural lands on Grand River,' etc. (Sec. 1), *for individual allotments.*" *Id.* at 24 n. 6 (emphasis added); n. 3 *supra*. That is the correct understanding of the Act's purpose and effect. It makes clear both that all tribal rights were ceded by the 1880 Act and that the 1950 settlement agreement forecloses the present claim.

II. THE ACCOUNTING ISSUES

The government's contentions regarding the accounting issues are, first, that respondent is jurisdictionally limited in its accounting demands to funds which can be traced to the proceeds of the sale of approximately 82,000 acres put in issue by its petition before the Commission;[4] and, second, that respondent is entitled in this proceeding to redress only of those

[4] It could, indeed, be doubted whether respondent's claims go even this far. Its assertion of damages, so far as here relevant, was initially limited to "an amount equal to that *received by defendant*" for the sale of the 82,000 acres, without mention of revenues those sums might have produced in government hands once received. App. 13 (Paras. 9c, d); emphasis added. That amount is precisely the amount already accounted for in other proceedings, n. 1, *supra*. But the government does not contend that the Court of Claims' relation back theory was improper as applied to the funds derived from the 82,000 acres.

errors in handling its funds which occurred before August 13, 1946.

Respondent appears now to state that it does not challenge the first of these contentions, and that it claims no funds through its exceptions other than those to which it is entitled as a result of the mishandling of funds specifically derived from the sale of the 82,000 acres. Resp. Br. 53 *et seq.*, 70. We did not previously understand its claims to be so limited;[5] nor, we think, did the Court of Claims or the Indian Claims Commission. So far as the "relation back" theories adopted by those bodies are concerned, we ask in this Court only that that limitation be made clear; the sorting out of matters which do and do not relate to funds resulting from the sale of the 82,000 acres can most appropriately be done below, on remand. Pet. Br. 31 n. 7. We agree that the government must furnish a complete and proper accounting in

[5] Respondent takes the government to task for giving as an example an exception which respondent says was rejected by the Commission and Court of Claims, the exception relating to the Proceeds of Labor fund. Resp. Br. 59. But the Commission did not reject the exception as outside its authority to entertain, as it should have done. It rejected only so much of the exception as asserted that the fund in question should have received interest at a 5 percent rate, holding that only 4 percent was due. App. 51–52. And having reached that conclusion, it required the United States to prepare a proper accounting of that fund at the 4 percent rate, and to bring that accounting up to date. App. 52. Since this fund does not include the proceeds of the sale of the approximately 82,000 acres, it is clear that the exception ought not to have been entertained, and that the United States ought not to have been subjected to this obligation. Respondent's suggestion that the government suffered no consequence by the Commission's ruling, affirmed without discussion by the Court of Claims, is erroneous.

this case of the funds from "the sale of approximately 81,953.18 acres" (App. 13); but it has no obligation in this case to account for other funds which may be mingled with those funds, or held in separate accounts. To the extent the court and Commission below believed that respondent sought to impose such an obligation and permitted it to do so, the government is entitled to have that error, now apparently conceded, corrected.

Regarding the second contention, we note again the distinction between respondent's undoubted right to have pre–1946 wrongs redressed up to the moment of judgment, and its assertion of a right in this proceeding to learn about and redress government mishandling of its funds occurring after 1946 through the medium of the extensive accounting obligation it seeks to impose. Thus, if the government wrongly failed to deposit funds derived from the sale of the 82,000 acres of land in an interest-bearing fund in a prior year, say 1935, respondent is entitled to redress of the damage it suffered to and including the date of judgment. The government could show, in mitigation of damage, that it had properly deposited the funds subsequently, for example in 1962, reducing its liability to that extent. But on the hypothetical given, respondent would certainly be entitled to full redress. We understand its claim here to be somewhat different. Respondent wishes to be able to examine how the government handled its money in 1957, or 1968, and to make claims for judgment on the basis of errors freshly made at that time. No other purpose could be served by demanding an accounting for those years. And that pur-

pose is improper under the statute limiting the Commission's authority to claims arising before August 13, 1946.

CONCLUSION

For these reasons, and the reasons stated in the government's principal brief, the decision of the Court of Claims should be reversed.

Respectfully submitted.

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FEBRUARY 1971.

U.S. GOVERNMENT PRINTING OFFICE: 1971